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Supreme Court, U.S.
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In The
Supreme Court of the United States

VICTOR ALICEA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

CATHERINE M. CANRIGHT
Counsel of Record
CANRIGHT LAW OFFICE
1507 Tower Avenue, Suite 333
Superior, WI 54880-2553
715-394-9466

EDWARD JOHN HUNT
THE HUNT LAW GROUP
316 N. Milwaukee Street
Suite 317
Milwaukee, WI 53202
414-225-0111

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

1. Whether the enhancement of petitioner's sentence by application of U.S.S.G. §3C.1 for obstructing justice violated the defendant's right to due process under the Fifth Amendment to the United States Constitution?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Victor Alicea respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment and sentence of the District Court in the United States District Court for the Western District of Wisconsin.

OPINIONS BELOW

The opinion of the court of appeals, *United States v. Victor Alicea*, 287 F.3d 609 (7th Cir. 2002), is in Appendix A. The Judgment in a Criminal Case containing the district court's judgment is contained in Appendix B.

Appendix C is a partial transcript of the sentencing hearing at which the district court articulated most of its oral ruling on petitioner's objection to the application of United States Sentencing Guideline §3C1.1 to enhance petitioner's sentence. (R315:46-49). Appendix D is another excerpt from the sentencing hearing containing the balance of the district court's oral decision to enhance petitioner's sentence under U.S.S.G. §3C1.1. (R315:52-53). In Appendix E is the magistrate's Order and Recommendation, containing the magistrate judge's recommendation that Victor Alicea's pretrial motion to suppress evidence and statements be granted. In Appendix F is the Memorandum and Order of the district court, rejecting the magistrate judge's recommendations.

JURISDICTION

The court of appeals entered judgment on April 19, 2002. This court's jurisdiction is invoked under 28 U.S.C. §§1254(a) and §2101(c) and Supreme Court Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition concerns the construction and application of the Due Process Clause of the Fifth Amendment to the United States Constitution which provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

U.S. Const. amend V.

Specifically, this petition concerns the due process implications of a district court judge's *de novo* determination with respect to a magistrate judge's proposed findings and recommendations in a proceeding on a dispositive motion in a criminal case and the effect of the determination on the decision to enhance a defendant's sentence under the United States Sentencing Guidelines, §3C1.1. U.S.S.G. §3C1.1 provides for a two level increase of a defendant's sentence if:

> (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense

of conviction and any relevant conduct; or (ii) a closely related offense.

U.S.S.G. §3C1.1.

STATEMENT OF THE CASE

In the pre-dawn hours of the winter morning, March 16, 2000, a team of about seven heavily armed law enforcement agents crashed through the front door of the Alicea family home. Shocked, startled, and scared, Victor Alicea ran to his screeching, terrified one year old daughter. Before he could pick her up from her crib in the darkened hallway, he was overwhelmed by a pack of four of the rifle-wielding invaders who yelled that they were the police and that Victor Alicea should get on the ground. He immediately went to the floor where he was cuffed and pushed upon by one of the agents as he lay, face down. He heard other agents yelling at his fiancée, Andrea, in the couple's bedroom. He heard the agents deny Andrea's pleadings to be allowed to put on pants to cover her naked bottom half until after she was handcuffed. Within minutes of the violent entry into his home by law enforcement, Victor Alicea was handcuffed and whisked upstairs, separated from the part of the home in which the rest of his terrified family was kept. During the trip upstairs, Special Agent Paul Byal advised Alicea that he was being arrested on federal drug charges.

Victor Alicea, set on a chair in the living room clad only in his boxers, watched helplessly as the armed agents looked through his home. One agent went through cupboards in the kitchen. One agent entered the bedrooms. Several remained downstairs. Victor could still hear his

children crying. At one point after the officers had been going through his house for a while, he heard an agent yell to a cohort that a safe had been found in the lower level of the house. Alicea was asked for the combination to the safe and he gave the information to the requesting agent. Alicea was asked what was in the safe. Alicea told the agents that an unloaded gun was in the safe.

After the safe had been opened and searched, Victor continued to watch agents rummage through his home. Agents then asked for his consent to search the vehicle in the garage.

Victor Alicea filed a pretrial motion to suppress the evidence seized from his home on March 16, 2000. In his motion, he argued that the agents did not have consent to search his house. The circumstances of the arrest and search rendered his subsequent statements to law enforcement officers involuntary.

An evidentiary hearing was held on Victor Alicea's motion to suppress evidence. Special Agent Paul Byal and Victor Alicea both testified at the hearing. (R130: Transcript of Motion Hearing, dated May 19, 2000). Magistrate Judge Stephen Crocker presided at the hearing, heard the testimony of the witnesses, and observed the demeanor of the witnesses as they testified. (R130).

Magistrate Judge Crocker found that Victor Alicea consented to the search of his home, but the consent was involuntary. (App. E:6). The magistrate judge did not rely on Victor Alicea's testimony in coming to these findings. (App. E:9). Instead, the magistrate judge relied solely on the testimony of the government's own witness at the hearing on Alicea's motion to suppress. (App. E:9). The magistrate judge found that, under the totality of the

circumstances, Alicea's consent was the product of both express and implied duress and coercion. (App. E:7). The magistrate judge found that Alicea was in his twenties and of average intelligence, but not particularly articulate. (App. E:7). Under the right circumstances, the magistrate judge opined, Victor Alicea was certainly *capable* of giving voluntary consent. (App. E:7). However, Magistrate Judge Crocker found that the circumstances about which Agent Byal and Victor Alicea testified were not conducive to a rational exercise of Victor Alicea's free will. (App. E:7).

From Agent Byal's testimony Magistrate Judge Crocker found that it was clear to the agents that Alicea was confused and upset. (App. E:8). Magistrate Judge Crocker found that the agent's admitted disregard of Alicea's negative response to the question about whether there were drugs present and the agent's admitted repetition of the question in expectation of receiving a different answer conveyed to Alicea the message that "the police obviously were going to do what they wanted and would disregard Alicea's input." (App. E:8).

The testimony of Agent Byal led Magistrate Judge Crocker to find that Alicea was, at the time of his arrest and at the time of the search of his home, "bewildered." (App. E:9). The testimony of Agent Byal convinced Magistrate Judge Crocker that any seeming indications of consent on Alicea's part were coerced by Byal's framing the grant of consent as "a test of Alicea's professed innocence: one way to convince the police there was nothing bad in the apartment was to let them confirm this for themselves with a search." (App. E:9).

Granted, Magistrate Judge Crocker indicated that he did not believe Victor Alicea's denial, made during his

testimony at the evidentiary hearing, that he did not give consent for a search. (App. E:9). However, the magistrate judge did not find or even suggest that Victor Alicea's denial was in any way the product of willful intent to mislead the court. (App. E). In fact, the tenor of the magistrate judge's entire Report and Recommendation indicates the magistrate's sympathetic understanding of the chaos and stress under which the circumstances about which Alicea testified unfolded. (App. E).

Victor Alicea did not commit perjury. Magistrate Judge Crocker did not find that Victor Alicea committed perjury. Magistrate Judge Crocker did not even suggest such a thing.[1]

The district court rejected the magistrate judge's recommendation to grant Victor Alicea's motion to suppress documents, the gun, and post-arrest statements because the consent and the post-arrest statements were, under the circumstances, involuntary. (App. F). Instead, the district court found that Victor Alicea's consent was

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[1] As indicated by Alicea in his objections to the presentence report prepared for the district court (R118), Magistrate Judge Crocker erroneously thought that Alicea contended that he was not provided with warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966). As pointed out in his objections below (R118), at no time during the evidentiary hearing on his motion to suppress and at no time since the evidentiary hearing did Alicea contend that he was not informed of his constitutional rights. During the evidentiary hearing, Alicea clearly indicated that after he told Agent Byal that he did not know his constitutional rights, Agent Byal informed Alicea of all of his rights. Alicea maintained that his statements were coerced and were, therefore, involuntary and inadmissible. He neither testified nor argued that he did not receive *Miranda* warnings.

voluntary and, therefore, the district court denied Alicea's motion to suppress evidence. (App. F:6).

Victor Alicea did not testify at the trial in his case. (R313: Transcript of Jury Trial, July 31, 2000; R312: Transcript of Jury Trial, August 1, 2000). At trial, the government introduced none of the evidence that was obtained as a result of the raid on Victor Alicea's home on March 16, 2000. (R313; R312). However, at sentencing, over Alicea's objection, the district court enhanced Alicea's sentence by two levels, pursuant to U.S.S.G. §3C1.1 for obstruction of justice. (App. C; App. D). The enhancement was based on the district court's determination, contrary to the magistrate judge's determination, that the information Alicea provided in his motion hearing testimony and in the affidavit he submitted in support of his motion to suppress evidence was willfully and materially false. (App. D). Although the magistrate judge who observed Victor Alicea's demeanor at the motion hearing did not find that Victor Alicea committed perjury, the district court rejected the magistrate judge's proposed findings and substituted his own appraisal without seeing and hearing the testimony of Victor Alicea and Agent Paul Byal. (App. C; App. D). Based on the district court's finding that Victor Alicea willfully provided false and material information, the district court applied the sentencing enhancement for obstruction of justice. U.S.S.G. §3C1.1. (App. C; App. D).

Victor Alicea raised on appeal the issue of the impropriety of the enhancement of his sentence by the district court's application of U.S.S.G. §3C1.1. The United States Court of Appeals for the Seventh Circuit affirmed the district court's application of U.S.S.G. §3C1.1. (App. A; *United States v. Victor Alicea*, 287 F.3d 609, 619-20 (7th Cir. 2002)). The United States Court of Appeals for the

Seventh Circuit found that the district court made the findings of the elements of perjury, required under *United States v. Dunnigan*, 507 U.S. 87, 94 (1993): (1) falsity; (2) willfullness; and (3) materiality. (App. A). *Id.* at 620. The appellate court stated: "A district court's determination that a defendant's testimony was false is adequate to support the enhancement," and cited *United States v. Turner*, 203 F.3d 1010, 1020 (7th Cir. 2000) and *United States v. Brimley*, 148 F.3d 819, 922-24 (7th Cir. 1998). *United States v. Victor Alicea*, 287 F.3d 609, 620 (7th Cir. 2002). (App. A).

REASONS FOR ALLOWANCE OF THE WRIT

1. This Court should settle an important question of federal law about which the Court has expressed concern in the past.

In *United States v. Raddatz*, 447 U.S. 667 (1980), this Court expressed deep concern about the situation presented in this case: the situation in which a district court rejects the proposed findings of fact and recommendations with respect to dispositive motions, including motions to suppress evidence in a criminal case, of a magistrate judge who has had the opportunity to hear and observe witnesses testify, and instead substitutes its own blind and deaf determinations of the credibility of witnesses. The United States Court of Appeals for the Seventh Circuit has, in affirming the district court's application of U.S.S.G. §3C1.1 to Victor Alicea's sentence based on just such a blind and deaf determination of his (in)credibility, decided an important question of federal law that has not been, but should be settled by this Court under Supreme Court Rule 10(c).

In *United States v. Raddatz*, 447 U.S. 667 (1980), the defendant moved to suppress incriminating statements he made to police officers and law enforcement agents on the grounds that the confession was not freely and voluntarily given. *Id.* at 669. The magistrate found that the defendant had knowingly, intelligently, and voluntarily made inculpatory statements and recommended that his motion to suppress be denied. Over the defendant's objections to the magistrate's report, the District Court accepted the recommendation and denied the motion to suppress, stating that it had considered the transcript of the magistrate's hearing, the parties' proposed findings of fact, conclusions of law, and supporting memoranda, the magistrate's recommendation, and the oral argument of counsel.

The defendant appealed the district court's decision and the United States District Court for the Seventh Circuit reversed on the grounds that the defendant had been deprived of due process by the procedure used in ruling on his suppression motion under the Federal Magistrates Act. *United States v. Raddatz*, 592 F.2d 976 (7th Cir. 1979).

The United States Supreme Court ultimately held that (1) Federal Magistrates Act under 28 U.S.C.A. §636(b)(1)(b), did not require a district court judge to rehear testimony on which the magistrate based his findings and recommendations in order to make an independent evaluation of credibility. *Raddatz*, 447 U.S. at 676; (2) a defendant's due process rights were adequately protected by the act, under which the district court judge alone acts as the ultimate decision maker, and permitting the district court judge to make a *de novo* determination of contested credibility assessments without personally hearing

live testimony did not violate due process. *Id.* at 680-681; and (3) although the Act permits the district court to give to the magistrate's proposed findings of fact and recommendations such weight as their merit commands and the sound discretion of the judge warrants, that delegation does not violate Article III of the Constitution so long as the ultimate decision is made by the district court. *Id.* at 683.

The Court recognized the limitation of this holding and indicated that, despite the holding, "serious questions would be raised if a district judge rejected a magistrate's proposed findings on credibility." *Id.,* footnote 7, at 681. The court stated:

> Neither the statute nor its legislative history reveals any specific consideration of the situation where a district judge after reviewing the record in the process of making a *de novo* "determination" has doubts concerning the credibility findings of the magistrate. The issue is not before us, but we assume it is unlikely that a district judge would *reject* a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing witnesses or witnesses whose credibility is in question could well give rise to serious questions which we do not reach. (Emphasis in original).

Raddatz, footnote 7, at 681.

This is not a case about perjury. When Victor Alicea testified about the chaos in his home at the time of his arrest, he testified truthfully and completely. The magistrate judge who listened to Alicea as he testified and who observed him as he testified did not find that he committed perjury.

Despite having no opportunity to ever hear or see Alicea testify, the district court rejected the magistrate judge's proposed findings and his recommendation and baselessly found that Alicea perjured himself during his testimony at the motion hearing and in an affidavit that was submitted in support of his motion to suppress. Based on the district court's determination that Victor Alicea provided willfully false and material information, the district court applied the two-level enhancement to Alicea's sentence, under U.S.S.G. §3C1.1, for obstructing justice.

The district court's decision to enhance Victor Alicea's sentence under U.S.S.G. §3C1.1 increased Victor Alicea's sentence by two years. The district court made the decision to apply the enhancement without ever having heard or seen Alicea's testimony. The district court's decision was made although the magistrate judge who heard and observed Alicea's testimony did not make any findings or suggestions that Alicea's testimony was willfully, materially false.

Although *Raddatz* did not address this specific sentencing guideline issue, what the decision says about credibility determinations is instructive. More importantly, the unanswered question raised by the *Raddatz* footnote discussed above should compel this Court in the interest of justice to accept Alicea's petition for review. Alicea's case is the case that will definitively answer the unanswered question from *Raddatz*.

2. This Court should exercise its supervisory power under Supreme Court Rule 10(a).

The decision of the United States Court of Appeals for the Seventh Circuit that affirms the application of the

enhancement under U.S.S.G. §3C1.1 to Victor Alicea's sentence, sanctions the district court's departure from the accepted and usual course of judicial proceedings to such an extent as to call for an exercise of this Court's supervisory power pursuant to Supreme Court Rule 10(a). In this case, the United States Court of Appeals for the Seventh Circuit upheld the district court's application of a sentencing enhancement imposed by the district court based upon the district court's rejection of a magistrate judge's proposed findings and recommendations regarding testimony of witnesses at a hearing at which the magistrate judge presided.

Without guidance from this Court, the situation presented in this case is bound to recur in United States District Courts and, for that matter, upon review of factual determinations by United States Courts of Appeals. It is important that this Court define the latitude that a district judge does or does not have to reject a magistrate judge's proposed findings of facts and recommendations and to apply the sentence enhancement for obstruction of justice under U.S.S.G. §3C1.1 based on findings that the defendant willfully provided false and material information when such findings are not supported by the magistrate judge's findings and recommendations.

CONCLUSION

For the reasons stated, the Court should grant a writ of certiorari to review the decision of the court of appeals.

Respectfully submitted,

CATHERINE M. CANRIGHT
Counsel of Record
CANRIGHT LAW OFFICE
1507 Tower Avenue, Suite 333
Superior, WI 54880-2553
715-394-9466

EDWARD JOHN HUNT
THE HUNT LAW GROUP
316 N. Milwaukee Street
Suite 317
Milwaukee, WI 53202
414-225-0111

Attorneys for Petitioner

APPENDIX A

In the
United States Court of Appeals
for the Seventh Circuit

Nos. 00-3519, 00-3520, 00-3747, 00-3781 & 01-1929

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DOUGLAS MARTIN, MELVIN ALICEA, HECTOR CARRASCO, VICTOR ALICEA, AND VICTOR MATIAS, JR.,

Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Wisconsin.
No. 00 CR 23 – **John C. Shabaz**, *Judge*.

ARGUED MARCH 1, 2002* – DECIDED APRIL 19, 2002

Before FLAUM, *Chief Judge*, BAUER and HARLINGTON WOOD, JR., *Circuit Judges*.

BAUER, *Circuit Judge*. The defendants were engaged in a conspiracy to distribute cocaine in Sauk County,

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* Case No. 3747, United States of America v. Hector Carrasco, was submitted on the briefs without oral argument. *See* FED. R. APP. P. 34; CIR. R. 34.

Wisconsin.[1] Several defendants elected to go to trial and were found guilty by their respective juries; others chose to plead guilty. The district court imposed sentences on each defendant. Almost all of the five defendants before this court appeal some aspect of their sentences, and the others raise a litany of additional issues related to their trials. For the following reasons, we affirm the verdicts and sentences for all five defendants.

BACKGROUND

The facts involve a rather long and convoluted series of meetings, statements, and transactions, most of which might make for colorful background information about the drug trade in Wisconsin, but are not pertinent to the issues on appeal. Therefore, we set forth only the facts necessary to each issue raised. Because some of the defendants appeal the same issues we will proceed by addressing each point of error raised and note the resulting application of law to each defendant's individual challenge.

ANALYSIS

A. *Apprendi* Violations

The defendants did not timely raise *Apprendi* objections below, thus the arguments were forfeited and we review only for plain error. *See, e.g., United States v. Cooper,* 243 F.3d 411, 415-16 (7th Cir. 2001), *cert. denied,*

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[1] In total, eight defendants were indicted and convicted, but only five have appealed aspects of their convictions or sentences. Johnny Alicea, Victor Matias, Sr., and Jefferson Selje did not appeal.

122 S.Ct. 64 (2001). To determine if there was plain error we apply a four-part test: "(1) whether there was error at all, (2) if so, whether it was plain, (3) whether the error affected . . . substantial rights, and (4) whether it seriously affected the fairness, integrity, or public reputation of the proceedings." *United States v. Robinson,* 250 F.3d 527, 529 (7th Cir. 2001), *cert. denied*, 122 S.Ct. 215 (2001). The defendants don't make it over the first hurdle: "whether there was an error at all." *Robinson,* 250 F.3d at 529.

1. Hector Carrasco (00-3747)

Hector Carrasco was indicted on a single count, for conspiring to distribute cocaine, a Schedule II controlled substance, in violation of 21 U.S.C. § 846. The indictment did not state the amount of drugs Carrasco conspired to distribute, although it did state the substance, cocaine. The jury found Carrasco guilty of the offense as charged in the indictment. Carrasco was sentenced to 97 months (just over 8 years) in prison and 3 years supervised release.

2. Victor Alicea (00-3781)

Victor Alicea was indicted on two counts: for conspiring to distribute cocaine, a Schedule II controlled substance, in violation of 21 U.S.C. § 846, and for distributing a controlled substance in violation of 21 U.S.C.§ 841(a)(1). The indictment did not state the amount of drugs Victor Alicea distributed or conspired to distribute, but it did name cocaine as the substance distributed. The jury found Victor Alicea guilty of both offenses. Victor Alicea was sentenced to two concurrent sentences of 120 months (two concurrent 10-year terms, one for each count) and two

concurrent 3-year terms of supervised release (one for each count).

Since it was decided, *Apprendi v. New Jersey,* 530 U.S. 466 (2000), has spawned an endless number of appeals by defendants seeking to determine and expand its scope. These defendants contend *Apprendi* requires the amount of cocaine they conspired to distribute be charged in the indictment and proven to the jury beyond a reasonable doubt. In this case, the district court in the sentencing phase found Carrasco accountable for 1,443.35 grams of cocaine and Victor Alicea accountable for 1,626 grams of cocaine by a preponderance of the evidence. Carrasco accurately notes that the penalty provisions in section 841(b) are based on drug quantity. *See* 21 U.S.C. § 841(b) (providing for penalties ranging from five years to life depending on the type and amount of drugs involved and if serious injury or death resulted from the use of the substances). Thus, possessing different types and amounts of drugs can alter the sentence a defendant faces. *Id.* Carrasco also correctly observes that drug quantity under *Apprendi* is an element – though not in the technical sense of the word – of the offense in section 841(b) that the government should specify and prove. *Apprendi*, 530 U.S. at 490; *United States v. Mietus,* 237 F.3d 866, 874 (7th Cir. 2001); *United States v. Bjorkman,* 270 F.3d 482, 490-92 (7th Cir. 2001) (per curiam) (holding that "*Apprendi* does not rewrite or change the elements of any federal offense; its [sic] does, however, determine who must make particular decisions, and what the burden of persuasion must be."); *but see United States v. Sheppard,* 219 F.3d 766, 767-69 & n.3 (8th Cir. 2000) (noting that quantity is an element of a § 841 offense, but there is likely no *Apprendi* problem if the sentence received is within the "statutory maximum

penalty for § 841 offenses involving *any quantity* of a Schedule II controlled substance") (emphasis in original). In any event, Carrasco and Victor Alicea's arguments in this situation are unavailing.

Apprendi only requires "any fact that increases the penalty for a crime *beyond the statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi,* 530 U.S. at 490 (emphasis added). If a drug amount is not charged in the indictment and proven beyond a reasonable doubt, "the statutory maximum under § 841(b) is to be determined without making any reference to drug amount." *United States v. Jones,* 245 F.3d 645, 647-48 (7th Cir. 2001); *United States v. Westmoreland,* 240 F.3d 618, 632 (7th Cir. 2001). Thus, "when a defendant's sentence does not exceed 20 years imprisonment – the maximum under § 841(b) for possessing/distributing the smallest amount of cocaine – *Apprendi* is irrelevant." *Robinson*, 250 F.3d at 529. There is no error, plain or otherwise, if the defendants' sentences do not exceed twenty years. *Id.*

Hector Carrasco received just over 8 years and Victor Alicea drew two concurrent sentences of 10 years. Neither of the sentences exceed the maximum sentence allowed (20 years) under section 841(b) when an amount of cocaine is not charged and proven. *See, e.g., id.; Jones*, 245 F.3d at 648-50. Could the indictment have listed the amounts? Certainly, but it is not required under *Apprendi*. *See, e.g., Robinson,* 250 F.3d at 527; *Jones,* 245 F.3d at 648-50. Should the indictment have listed the amounts? Probably, because it would have undoubtedly reduced the defendants'

avenues of appeal and allowed their sentences to be increased (based on drug amounts).[2] *See United States v. Brough,* 243 F.3d 1078, 1079-80 (7th Cir. 2001), *cert. denied*, 122 S.Ct. 203 (2001) (noting that "a post-*Apprendi* indictment *should specify* . . . the events listed in § 841(b) [amount and type of drugs] on which the prosecutor relies to establish the maximum sentence.") (emphasis added); *see also Bjorkman,* 270 F.3d at 491-92 (explaining the difference between the "must" prove elements in § 841(a) and "should" prove drug quantity in § 841(b)). Must the indictment list the amounts and the government prove them beyond a reasonable doubt? No, not when the sentence a defendant receives does not exceed the statutory maximum of 20 years for possessing or distributing the smallest amount of a Schedule II controlled substance. *See, e.g., Robinson,* 250 F.3d at 527; *Jones,* 245 F.3d at 648-50.

Victor Alicea, in addition to the argument advanced above, asserts that 21 U.S.C. § 841(b) is unconstitutional. We have already determined that Section 841(b) is not unconstitutional. *Brough,* 243 F.3d at 1079-80 ("we now hold, that there is no constitutional defect in the design of § 841, and that there is no impediment to convictions under the statute as written."); *see also United States v. Collins,* 272 F.3d 984, 988-89 (7th Cir. 2001).

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[2] An example of a better indictment is provided by another defendant in this appeal. Count one of the superceding indictment against Victor Matias, Jr. specifically charged Matias, Jr. with conspiring to distribute in excess of 500 grams of cocaine. The jury found that Matias, Jr. did conspire to distribute more than 500 grams of cocaine. This more comprehensive indictment probably accounts for Matias, Jr. not appealing his sentence based on *Apprendi*.

B. *U.S.S.G. § 2D1.1 Drug Quantity Determination*

We review a district court's factual findings in applying the Sentencing Guidelines for clear error. *United States v. Williams,* 272 F.3d 845, 851-52 (7th Cir. 2002), *cert. denied,* 122 S.Ct. 1339 (2002); *United States v. Joiner,* 183 F.3d 635, 640 (7th Cir. 1999). Under this familiar standard, we review the district court's findings to determine if there is any evidence in the record to support the findings, and will reverse only if we have a "'firm and definite conviction that a mistake has been made.'" *E.g.*, *United States v. Miner,* 127 F.3d 610, 614-15 (7th Cir. 1997) (citation omitted). Reasonable estimates of drug amounts based on the Presentence Investigation Report (PSR), testimony, and other evidence are permissible, while speculation is not. *Westmoreland,* 240 F.3d at 630-32; *Joiner,* 183 F.3d at 640; *United States v. Jarrett,* 133 F.3d 519, 530 (7th Cir. 1998).

1. Douglas Martin (00-3519)

Martin argues that he never "intended" or "agreed" to provide cocaine to Lisa Templin, and he asserts that any comments he made to that effect were the result of one too many drinks or mere boasting. (One frequently leads to the other in many areas of life.) The district court found 544.06 grams of cocaine attributable to Douglas Martin and sentenced him to 60 months (5 years) in prison and 3 years supervised release. The finding was based on the PSR, conversations Martin had with others, and remarks he made involving Templin. Martin joined the conspiracy late, but moved up in the ranks rather quickly to become Victor Matias, Jr.'s "right hand man." Victor Matias, Jr. was found to have distributed some 7.7 kilograms of cocaine, but the district court took into account Martin's

late arrival and attributed only a portion of that amount to him. Martin told Templin that he could obtain 500 grams of cocaine from Victor Matias, Jr. The district court found this statement credible because Matias, Jr. dealt large amounts of cocaine and Martin was his very close assistant. It was not clear error for the district court to find Douglas Martin accountable for at least 544.06 grams of cocaine. *See Westmoreland,* 240 F.3d at 630-32.

C. *U.S.S.G. § 2D1.1(b)(1) Possession of a Dangerous Weapon*

The district court's application of a sentencing guidelines enhancement is also reviewed for clear error. *See United States v. Smith,* 280 F.3d 807, 810 (7th Cir. 2002); *Bjorkman,* 270 F.3d at 493; *United States v. Berthiaume,* 233 F.3d 1000, 1002 (7th Cir. 2000); *United States v. Cain,* 155 F.3d 840, 843 (7th Cir. 1998). Substantial deference is accorded to findings based on credibility, which are almost never clear error. *See, e.g., United States v. Hickok,* 77 F.3d 992, 1007 (7th Cir. 1996).

Section 2D1.1(b)(1) provides: "If a dangerous weapon (including a firearm) was possessed, increase [the offense level] by 2 levels." U.S.S.G. § 2D1.1(b)(1). Application Note 3 further provides:

> The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied *if the weapon was present*, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet.

U.S.S.G. § 2D.1.1 [sic], Application Note 3. Based upon the language in section 2D1.1, we have held that the government need only demonstrate, by a preponderance of the evidence, that the defendant possessed the weapon during the relevant period of drug activity. *Bjorkman,* 270 F.3d at 492-93. And "once the Government meets its burden, the defendant must demonstrate that it was clearly improbable that the weapon was connected to the offense." *United States v. Booker,* 248 F.3d 683, 689 (7th Cir. 2001); *Bjorkman,* 270 F.3d at 492-93.

1. Melvin Alicea (00-3520)

To the government's knowledge the drug conspiracy began in 1994 and lasted until 1999. Bureau of Alcohol Tobacco & Firearms (ATF) records established that Melvin Alicea purchased fourteen firearms (thirteen handguns and one rifle) between 1995 and 1997. Melvin Alicea showed one of his customers, Perry Zubeck, one of the handguns he owned. Melvin also threatened another customer, who he heard had been talking to the police, stating, "[talking] was a good way to get a bullet in the head."

2. Victor Alicea (00-3781)

Victor Alicea joined the conspiracy in 1995, and ATF records showed that Victor Alicea bought a handgun in 1996. A stainless steel .9 mm Ruger handgun with a laser-aiming device was recovered from Victor Alicea's home. During the sentencing hearing Adam Young, a regular customer of Victor Alicea's since 1995, testified that during one occasion when he went to Alicea's home, Alicea showed Young a stainless steel Ruger handgun with a laser-aiming

device. The gun was later identified as the same one recovered from Alicea's home.

The government argued that Victor Alicea showed Young the weapon to deter Young and anyone else from robbing him. Alicea asserts that there is no "nexus" between the firearm and the drug conspiracy because no evidence establishes that the weapon was "used" during the conspiracy. In his brief Victor Alicea states that no drugs were recovered from his home and that there was no ammunition found in the weapon. Melvin Alicea, in a similar vein, argues that there is no evidence he "brandished" or "displayed" a weapon during a drug transaction.

The defendants' arguments misapprehend the government's burden; the government need only demonstrate that the defendant possessed a weapon during the drug conspiracy. *See, e.g., Booker,* 248 F.3d at 689. Then it is up to the defendant to refute this claim by establishing that it was clearly improbable that the weapon was connected to the offense. *Bjorkman,* 270 F.3d at 493. Although the gun was not found loaded or next to drugs at the time it was recovered, that does not establish that the weapon had no connection to the conspiracy. *See United States v. Adams,* 125 F.3d 586, 596 (7th Cir. 1997) (holding "the government is not required to show that the weapon was present during a specific drug trafficking offense."); *Cain,* 155 F.3d at 843-44 (rejecting the defendant's argument that his possession of "the gun was unrelated to the drug conspiracy"); *see also United States v. Cantero,* 995 F.2d 1407, 1412 (7th Cir. 1993) (noting that "drug dealers often carry weapons to protect themselves and their large amounts of drugs and cash."). The district court found that both Victor Alicea and Melvin Alicea did possess weapons during the

relevant period of conduct and it was not clearly improbable that the weapons were connected with the drug conspiracy. There is no clear error in these findings.

D. *U.S.S.G. § 3C1.1 Obstruction of Justice*

In determining if the sentencing enhancement was properly applied we review the district court's findings of fact for clear error. *E.g., United States v. Carrera,* 259 F.3d 818, 831 (7th Cir. 2001). The prosecution must establish that the enhancement is applicable by a preponderance of the evidence. *United States v. Ewing,* 129 F.3d 430, 434 (7th Cir. 1997). Section 3C1.1 provides:

> If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

U.S.S.G. § 3C.1.1. [sic].

1. Douglas Martin (00-3519)

Lisa Templin, after being confronted by federal agents about her involvement in the conspiracy, agreed to cooperate with the agents and make controlled buys in 1999. Templin set up a controlled buy, and the following day Victor Matias, Jr.'s home was searched and he was arrested. Evidently Matias, Jr. put two and two together and called Hector Carrasco, told Carrasco "Lisa" had informed on him, and that Carrasco should tell her to "knock it off."

After posting bond Victor Matias, Jr. and Douglas Martin visited Lisa Templin at home. Templin's roommate answered the door and Martin restrained her while Matias, Jr. confronted Templin.

Martin argues that "there is no direct proof" that he was at the residence because Lisa Templin only relayed what her roommate told her happened and did not see Martin herself. "[T]he Federal Rules of Evidence do not apply at sentencing hearings" and the judge may consider information that would not be admissible at trial, including uncorroborated hearsay. *Smith*, 280 F.3d at 810. The district court concluded that Martin attempted to obstruct justice by aiding and abetting Matias, Jr.'s efforts to intimidate Lisa Templin and by restraining Templin's roommate. *See* U.S.S.G. § 3C1.1, Application Note 9 ("Under this section, the defendant is accountable for his own conduct and for conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused."). The district court's findings are sufficient to impose the enhancement and there was no clear error.

2. Melvin Alicea (00-3520)

In 1997, Michael Sutton was a cooperating informant who made a series of controlled buys from the defendants wearing a recording device. In June 1997, Melvin Alicea "heard" that Sutton might have "said something [to the police]" about their deals. Melvin told Sutton that "[talking to the police] was a good way to get a bullet in the head." Melvin was found to have obstructed the investigation by threatening Sutton.

Melvin argues that in order for the guideline to apply he would have to know or believe than [sic] an investigation is

underway, otherwise there is no "willful" violation. For support he cites *United States v. Oppendahl,* 998 F.2d 584, 586 (8th Cir. 1993), which held the term "'willfully' [in U.S.S.G. § 3C1.1(A)] should be reserved for the more serious case, where misconduct occurs with knowledge of an investigation, or at least with a correct belief that an investigation is probably underway." However, this circuit has already ruled that knowledge of an investigation is not required for a "willful" violation to occur. *United States v. Snyder,* 189 F.3d 640, 648 (7th Cir. 1999) ("It is clear, however, that a defendant need not know that he is under investigation at the time of the obstructive conduct."); *United States v. Schmidt,* 47 F.3d 188, 192 n.3 (7th Cir. 1995); *United States v. Polland,* 994 F.2d 1262, 1269 (7th Cir. 1993); *accord United States v. Jenkins,* 275 F.3d 283, 288-89 (3d Cir. 2001). The term "willful" does not mean "knowing" or "aware," it means "intentionally" or "deliberately." *Jenkins,* 275 F.3d at 287-88 (holding that "[i]n view of the language, structure, and context of U.S.S.G. § 3C1.1, we believe the ordinary meaning of 'willfully' is 'deliberately or intentionally'"); *cf. Ewing,* 129 F.3d at 434-35. Thus, a defendant does not need to "know" or be "aware" that an investigation is underway, rather he need only "intentionally" or "deliberately" impede or attempt to obstruct justice for the enhancement to apply. *Jenkins,* 275 F.3d at 287-88.

Accepting Melvin Alicea's contention would allow defendants to threaten witnesses and informants with impunity if they simply argue they did not know the police were attempting to catch them conducting dangerous illegal activity. The obstruction of justice enhancement in section 3C1.1 is not dependent on a defendant's subjective knowledge and its scope is not so narrow; otherwise every

defendant would be able to avoid its imposition by claiming lack of knowledge. *See Snyder,* 189 F.3d at 648-49; *Polland,* 994 F.2d at 1269; U.S.S.G. § 3C1.1 (providing that the enhancement shall be applied if: "(A) the defendant willfully obstructed or impeded, or *attempted to obstruct or impede, the administration of justice* during the course of the investigation, prosecution, or sentencing of the instant offense of conviction") (emphasis added); U.S.S.G. § 3C1.1, Application Note 4 (listing conduct the adjustment applies to including: "(a) *threatening, intimidating, or otherwise unlawfully influencing* a co-defendant, witness, or juror, *directly or indirectly, or attempting to do so*") (emphasis added); *Ewing,* 129 F.3d at 435.

Moreover, *Oppendahl* provides little support for Melvin Alicea's proposition considering the district court's finding that Melvin made the threat because he *believed* an investigation was underway. *Oppendahl,* 998 F.2d at 586 (conceding "misconduct occurs [when a defendant obstructs or attempts to obstruct justice] . . . with a correct belief that an investigation is probably underway"). As the district court noted, Melvin Alicea made a threat to "the confidential informant, [or] at least the person to whom Mr. Alicea believed to be a confidential informant." The district court's findings fully support the imposition of the enhancement and are not clearly erroneous.

3. Victor Alicea (00-3781)

Victor Alicea moved to suppress the evidence obtained in the search of his home on the grounds that he never gave consent to search. Victor submitted an affidavit in support of his motion stating that the officers never asked for consent to search and he never gave consent to search.

In the alternative, Victor stated that if he gave consent, it was not voluntary. Special Agent Paul Byal testified to the contrary. In addition to the affidavit, Magistrate Judge Stephen Crocker heard testimony from Victor at the evidentiary hearing. The magistrate judge found that Victor did consent to the search and specifically that he did not believe Victor's assertion that he did not consent; however, he also concluded that the consent was not voluntary, based on the stressful circumstances, and recommended suppressing the evidence. The district court found the consent to search was voluntarily given and refused to suppress the evidence.

The enhancement may be imposed for: "providing materially false information to a judge or magistrate." U.S.S.G. § 3C1.1, Application Note 4(f). In the perjury context, which is akin to providing false information to a judge, we have required the district court to find the three elements of: (1) falsity; (2) willfulness; and (3) materiality. *E.g.*, *United States v. Brimley,* 148 F.3d 819, 823 (7th Cir. 1998); *see also United States v. Dunnigan,* 507 U.S. 87, 94 (1993). Whether the district court made the appropriate findings is reviewed *de novo*, and the district court's factual findings supporting the enhancement are reviewed for clear error. *United States v. Gage,* 183 F.3d 711, 715 (7th Cir. 1999).

The district court made the requisite findings, determining Victor Alicea "did provide his consent [to search], it was voluntary, and the Court believes that it was willfully false and certainly material to the issue at hand." Nevertheless, Victor argues that there was "no indication that Victor Alicea willfully sought to mislead the court," therefore the enhancement should not have been imposed. However, a district court's determination that

a defendant's testimony was false is adequate to support the enhancement. *United States v. Turner,* 203 F.3d 1010, 1020 (7th Cir. 2000); *Brimley,* 148 F.3d at 822-24. The application of the sentencing enhancement based on Victor Alicea's false testimony was not clear error.

E. *Violation of the Sixth Amendment Right to Confrontation*

A district court's limitation of cross-examination is reviewed for an abuse of discretion, unless it directly implicates the core values of the Sixth Amendment right of confrontation which we review *de novo*. *E.g.*, *United States v. Neeley,* 980 F.2d 1074, 1080 (7th Cir. 1992). Cross-examination in order to establish credibility, veracity, bias, or motivation is a core concern; at the same time, continuous, cumulative, or repeated exploration of such issues is a peripheral concern which the trial court may curb at its discretion. *E.g.*, *United States v. Nelson,* 39 F.3d 705, 707-08 (7th Cir. 1994). "So long as cross-examination elicits *adequate information* to allow a jury to assess a witness's credibility, motives, or possible bias, the Sixth Amendment is not compromised." *United States v. Scott,* 145 F.3d 878, 888 (7th Cir. 1998) (emphasis added); *United States v. Saunders,* 166 F.3d 907, 919 (7th Cir. 1999).

1. Victor Alicea (00-3781)

At issue is the testimony of Justin Maldonado. Maldonado testified that between 1994 and 1999 he purchased cocaine from Melvin Alicea, Johnny Alicea, and Victor Matias, Jr. When Maldonado was asked by Victor Alicea's attorney about selling cocaine he invoked his Fifth Amendment right not to answer. However, on re-direct

examination by the government Maldonado admitted he told the police about his cocaine sales to others.

Neither Melvin Alicea, Johnny Alicea, nor Victor Matias, Jr. asserts a Sixth Amendment violation based on Maldonado's invocation of his Fifth Amendment right. Instead, Victor Alicea, who Maldonado did not mention, asserts that he was denied his right to confront *his accusers* by the district court's ruling sustaining the government's objection to further questioning after the Fifth Amendment protection was invoked. Victor Alicea argues that by sustaining the government's objection, the district court prevented him from exposing Maldonado's criminal activity, which the jury could have used to weigh Maldonado's credibility.

Putting aside the fact that Maldonado never testified about Victor Alicea, Victor Alicea's Sixth Amendment right was not violated by the district court's limitation of Alicea's attorney's cumulative cross-examination into the specifics of Maldonado's drug sales. *See United States v. Williamson,* 202 F.3d 974, 977-79 (7th Cir. 2000). The trial transcript reveals that Victor's attorney thoroughly cross-examined Maldonado inquiring about his many purchases of cocaine, sale of cocaine and fake cocaine, the government's failure to prosecute him for those prior acts, and the government's current deal with him pertaining to this trial. (Tr., Aug. 1, 2000, a.m. session, at 101-106). Also, at closing arguments Victor's attorney stated: "He [Maldonado] was passing off just one more story, one more thing that would help him out in keeping his record of not being prosecuted for now seven counts he still has open or seven different people that he sold drugs to that the government was aware of that he's not been prosecuted for." (Tr., Aug. 1, 2000, p.m. session, at 73-74). These are

the same facts that Victor claims he was prevented from developing on cross-examination.

After all this testimony there is absolutely no doubt the jury was well aware of Maldonado's character and motivations for testifying. *Williamson,* 202 F.3d at 977 ("The right to cross-examination is not unlimited; the Confrontation Clause guarantees only effective cross-examination, not cross-examination of any type sought by the defendant."). The district court did not abuse its discretion by limiting further cross-examination on this peripheral matter.

F. *U.S.S.G. § 6B1.2 Rejection of a Plea Agreement*

A district court's decision to accept or reject a plea agreement is reviewed for an abuse of discretion. *United States v. Sandles,* 80 F.3d 1145, 1147 (7th Cir. 1996); *United States v. Greener,* 979 F.2d 517, 518 (7th Cir. 1992). The district court, exercising its discretion, may accept or reject a guilty plea since there is "no absolute right to have a guilty plea accepted." *Santobello v. New York,* 404 U.S. 257, 262 (1971); *United States v. Denegal,* 678 F.2d 47, 50 (7th Cir. 1982); *Greener,* 979 F.2d at 519-20. Plea agreements are contracts between the parties, and like stipulations, do not bind the court. *See Sandles,* 80 F.3d at 1147-48.

Under the rubric of the Sentencing Guidelines the court has the responsibility to use its sound discretion to examine plea agreements. As section 6B1.2(a) of the Sentencing Guidelines provides:

> In the case of a plea agreement *that includes the dismissal of any charges* or an agreement not to pursue potential charges [Rule 11(e)(1)(A)], the

> court may accept the agreement if the court determines, for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines.

U.S.S.G. § 6B1.2(a) (Policy Statement) (emphasis added). Additionally, the official commentary to section 6B1.2 provides:

> This requirement does not authorize judges to intrude upon the charging discretion of the prosecutor. If the government's motion to dismiss charges or statement that potential charges will not be pursued is not contingent on the disposition of the remaining charges, the judge should defer to the government's position except under extraordinary circumstances. Rule 48(a), FED. R. CRIM. P. *However, when the dismissal of charges or agreement not to pursue potential charges is contingent on acceptance of a plea agreement, the court's authority to adjudicate guilt and impose sentence is implicated, and the court is to determine whether or not dismissal of charges will undermine the sentencing guidelines.*

U.S.S.G. § 6B1.2 (commentary) (emphasis added). "The sentencing judge must ensure that the main objectives of the sentencing guidelines, consistency and certainty in sentencing, are not undermined by plea bargaining between the parties." *Greener,* 979 F.2d at 520. It is with these principles in mind we turn to the challenge at hand.

1. Victor Matias, Jr. (01-1929)

The plea agreement provided that Victor Matias, Jr. would plead guilty to conspiracy, and under oath he provided testimony regarding the activities of the conspiracy. In exchange, the government would dismiss the remaining two counts of the indictment for distribution. After the parties agreed to the plea, Matias, Jr. testified at the trial of Hector Carrasco, Johnny Alicea, and Victor Alicea. Matias, Jr.'s testimony at trial was directly contradictory to his prior sworn testimony. Matias, Jr. denied that he and the other three defendants on trial engaged in any drug deals, purchases, or conspiracy.

Based on the plea agreement the maximum sentence for the remaining conspiracy charge was 240 months (20 years) in prison. The PSR had previously calculated his potential sentence (based on all three counts and applicable enhancements) at 360 months (30 years) to life in prison. At sentencing, the district court reviewed the plea agreement and rejected it, finding it did not adequately reflect the severity of the defendant's conduct and would "undermine the sentencing guidelines." Matias, Jr. subsequently withdrew his guilty plea. A superceding indictment alleging five counts was returned and the district court dismissed the prior indictment. A trial commenced and the jury found Matias, Jr. guilty on all five counts. The district court then sentenced Matias, Jr. to 360 months (30 years) and 5 years supervised release, and a concurrent term of 240 months (20 years) and 3 years supervised release.

Matias, Jr. does not argue that the district court abused its discretion in rejecting his plea agreement. Rather, Matias, Jr. asserts that the district court usurped

the authority of the prosecutor in violation [of] the principle of separation of powers. In the alternative, Matias, Jr. argues that U.S.S.G. § 6B1.2 is unconstitutional. These claims are, by far, the most imaginative arguments raised by any of the defendants in this appeal, albeit equally unsuccessful.

At the outset, Matias, Jr. seeks to treat the dismissal of the other counts as separate from the plea agreement. In the context of a plea agreement, the dismissal of specific charges is contingent on the defendant's guilty plea to other charges; in sum the dismissal and guilty plea are two parts of one agreement. *Cf. United States v. Peterson,* 268 F.3d 533, 534 (7th Cir. 2001). A plea agreement is a unified document, and even if the district court wanted to it could not accept part and reject part. *See id.* ("The whole plea agreement stands, or the whole thing falls.").

Matias, Jr. cites a number of cases in which a district court refused to grant *a prosecutor's motion* to dismiss the indictment under FED. R. CRIM. P. 48 and were reversed on appeal. The decision to indict, allege specific charges, or dismiss charges is inherently an exercise of executive power, and the prosecutor has broad discretion in these matters. *See, e.g., Newman v. United States,* 382 F.2d 479, 480-82 (D.C. Cir. 1967) (Burger, J.). The executive can choose not to prosecute one case, yet prosecute vigorously another involving the same issues. *See id.* (citing cases and stating that "[t]wo persons may have committed what is precisely the same legal offense but the prosecutor is not compelled by law, duty or tradition to treat them the same as to charges."). The judiciary cannot compel prosecutions, nor can a judge refuse to grant the prosecution's voluntary motion to dismiss charges absent a specific finding of bad faith. *See United States v. Palomares,* 119 F.3d 556, 558

(7th Cir. 1997); *United States v. Smith,* 55 F.3d 157, 158-59 (4th Cir. 1995). Rule 48 of the Federal Rules of Criminal Procedure, requiring "leave of court" to dismiss an indictment, checks the discretionary power of the prosecutor to seek a *nolle prosequi* and later re-indict on the same charges. Rule 48 allows a court to ensure the fair administration of justice and prevent harassment of a defendant. *Smith,* 55 F.3d at 158-59. The leave of court requirement does not allow the judiciary to exercise executive powers; rather the condition protects the justice system judges oversee from misuse *after* proceedings have been initiated by the executive. *See United States v. Goodson,* 204 F.3d 508, 512-15 (4th Cir. 2000) (noting a court may dismiss charges under Rule 48(b) to "preserve the integrity of the judicial process.").

Since the judicial check on the prosecutorial power is a very limited one, a prosecutor's motion to dismiss must be granted unless "clearly contrary to manifest public interest." *Smith,* 55 F.3d at 158-59; *United States v. Hamm,* 659 F.2d 624, 628-30 (5th Cir., Unit A, Oct. 1981) (en banc); *see also Rinaldi v. United States,* 434 U.S. 22, 30 (1977). Judicial discretion becomes extremely limited in circumstances where the prosecutor seeks to dismiss the indictment with prejudice and the defendant joins the motion.

The facts of this case are in stark contrast to the Rule 48 cases cited above. The district court, exercising its authority under U.S.S.G. 6B1.2, rejected a plea agreement, not a motion to dismiss pursuant to FED. R. CRIM. P. 48. The United States Attorney for the Western District of Wisconsin did not once object to the district court's rejection of the plea agreement, and does not assert that prosecutorial authority has been, in any way, usurped. As

this panel suggested at oral argument, the Assistant U.S. Attorney, if he wanted to, could have effectuated the same result the plea agreement sought to by moving to dismiss the other counts with prejudice and having Matias, Jr. plead guilty to the remaining count. If Matias, Jr. joined a motion to dismiss with prejudice, the court would have been required to grant the motion, absent a specific finding that dismissal would be manifestly against the public interest. *Cf. Hamm,* 659 F.2d 629-30; *Smith,* 33 F.3d at 159. However, the U.S. Attorney was not upset by the rejection of the plea agreement because Matias, Jr., after accepting the benefits of the plea agreement, attempted to sabotage the U.S. Attorney's case by taking the witness stand and committing perjury in the trial of three other co-conspirators.

As we noted at the outset of this analysis, the court has a role to play in plea bargains and need not accept a plea agreement because there is no absolute right to plead guilty. *Greener,* 979 F.2d at 519-20. The district court in *Greener* rejected two plea agreements before finally accepting a third, and we found the rejections to be well within the court's discretion. *Id.* The agreement here did not bind the court, and it was free to reject the agreement if it found the agreement would undermine the sentencing guidelines or did not adequately take into account the defendant's relevant conduct. *See id.; Sandles,* 80 F.3d at 1147-49. Taking into consideration Matias, Jr.'s role in the conspiracy and the sentence he would receive, the district court properly rejected the plea on the grounds it would undermine the sentencing guidelines. *Greener,* 979 F.2d at 519-20. The district court's role in reviewing plea agreements under U.S.S.G. 6B1.2 is neither improper, nor an

exercise of executive authority in violation of the constitution. We conclude the district court did not abuse its discretion in rejecting the plea agreement in this case.

CONCLUSION

Because there are no errors in the district court's rulings at trial, and because the district court properly sentenced each defendant, we AFFIRM all the defendants' convictions and sentences.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

United States District Court
Western District of Wisconsin

UNITED STATES OF AMERICA V. **VICTOR ALICEA**	**JUDGMENT IN A CRIMINAL CASE** (for offenses committed on or after November 1, 1987) **Case Number: 00-CR-23-S-05** **Defendant's Attorney: KATHLEEN QUINN**

Defendant, Victor Alicea, was found guilty on counts 1 and 2 of the indictment.

Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 846 and 18 U.S.C. § 2	Conspiracy to Distribute and Possess with Intent to Distribute Cocaine, a Schedule II Controlled Substance, in violation of 21 U.S.C. § 841(A)(1); a Class C felony	July 20, 1999	1

21 U.S.C. § 841(a)(1) and	Distribution of Cocaine, a Schedule II Controlled	June 4, 1997	2
18 U.S.C. § 2	Substance; a Class C felony		

This Defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Date of Birth:	December 29, 1973
Defendant's USM No.:	04684-090
Defendant's Residence Address:	627 Potter Street Baraboo, WI 53913
Defendant's Mailing Address:	c/o Dane County Jail 210 Martin Luther King Blvd. Madison, WI 53709

October 11, 2000
Date of Imposition of Judgment

/s/ John C. Shabaz
John C. Shabaz
Chief U.S. District Judge

October 13, 2000
Date Signed:

CC: DEFT., USA, USM, PROBA, Quinn, JCS
Date October 16, 2000
By L. Kampen

A TRUE COPY, Certified
OCT 16 2000
Joseph W. Skupniewitz, Clerk
U.S. District Court
Western District of Wisconsin
By LuAnn Kampen
Deputy Clerk

IMPRISONMENT

Further, as to each of Counts 1 and 2, it is ordered that the defendant is committed to the custody of the Bureau of Prisons for imprisonment for a term of 120 months, with the terms to run concurrently. The Court recommends that the last *6 months* of his sentence be spent in a community corrections center with work release privileges but without home confinement:

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on 10-31-00 to FPC Duluth at Minn., with a certified copy of this judgment.

L. [Illegible]
~~UNITED STATES MARSHAL~~
By BOP USPTHA BUS
~~Deputy Marshal~~

SUPERVISED RELEASE

The term of confinement is to be followed by a three-year term of supervised release as to each count, to run concurrently.

Defendant shall report to the probation office in the district to which defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

Defendant shall not commit another federal, state, or local crime.

Defendant shall not illegally possess a controlled substance.

If Defendant has been convicted of a felony, defendant shall not possess a firearm or destructive device while on supervised release.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Financial Penalties sheet of this judgment.

Defendant shall comply with the standard conditions that have been adopted by this court (set forth on the next page).

As special conditions of supervised release, the defendant is to:

(1) Abstain from the use of alcohol, from the use of illegal drugs, from associations with drug users and sellers, and participate in substance abuse treatment and testing as directed by the supervising U.S. probation officer;

(2) Provide financial information to the supervising U.S. probation officer as directed;

(3) Register with local law enforcement agencies and the state attorney general as directed by the supervising U.S. probation officer; and

(4) Allow searches by the supervising U.S. probation officer of any residence or property under defendant's control where there is reason to believe defendant is in possession of illegal narcotics, stolen materials, firearms, or other contraband and permit confiscation of any contraband materials.

STANDARD CONDITIONS OF SUPERVISION

1) Defendant shall not leave the judicial district without the permission of the court or probation officer;

2) Defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) Defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) Defendant shall support his or her dependants and meet other family responsibilities;

5) Defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) Defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

7) Defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled

substance, or any paraphernalia related to such substances except as prescribed by a physician;

8) Defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) Defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) Defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) Defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) Defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) As directed by the probation officer, defendant shall notify third parties of risks that may be occasioned by defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

Defendant shall pay the following total financial penalties in accordance with the schedule of payments set forth below.

Count	Assessment	Fine	Restitution
1	$100.00	$0.00	$0.00
2	$100.00	$0.00	$0.00
Total	$200.00	$0.00	$0.00

As to each of Counts 1 and 2 of the indictment, it is adjudged that the defendant is to pay a $100 criminal assessment penalty, for a total of $200, to the Clerk of Court for the Western District of Wisconsin immediately following sentencing.

The defendant has neither the present means nor the earning capacity to pay a fine under § 5E1.2(c) without impairing his ability to support himself and his dependents.

RESTITUTION

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order:

(1) assessment;

(2) restitution;

(3) fine principal;

(4) cost of prosecution;

(5) interest;

(6) penalties.

The total fine and other monetary penalties shall be due in full immediately unless otherwise stated elsewhere.

Unless the court has expressly ordered otherwise in the special instructions above, if the judgment imposes a

period of prisonment, payment of monetary penalties shall be due during the period of imprisonment.

STATEMENT OF REASONS

The Court adopts the amended guideline calculations proposed by the probation office, as amended by the Court using the November 1998 guidelines manual. The Court finds *Apprendi v. New Jersey,* 120 S.Ct. 2348 (2000), is not applicable to the guideline determinations in this case because the drug quantities and firearm possession are sentencing factors which do not result in a guideline range exceeding the statutorily imposed maximum term of twenty years. The defendant is held accountable for his own acts and the acts of others that were in furtherance of their jointly undertaken criminal activity and were reasonably foreseeable to him, according to § 1B1.3(a)(1)(B). His relevant conduct involved approximately 1.63 kilograms of cocaine, resulting in a base offense level of 26. The two-level increase in § 2D1.1(b)(1) is applied because the defendant possessed a firearm during the conspiracy, and it is not clearly improbable the weapon was connected with the offense. The two-level increase in § 3C1.1 is applied because the Court finds the defendant's testimony and his affidavit at the hearing on his motion to suppress evidence was wilfully false and material not only to the issues at hand but to this Court's determination that the motion to suppress be denied. The defendant is not eligible for any downward adjustment for acceptance of responsibility because he took his case to trial and made no admissions of guilt. Pairing the total offense level of 30 with criminal history category I results in a guideline imprisonment range of 97 to 121 months.

A sentence near the top of the guideline imprisonment range is warranted because the quantity of cocaine for which the defendant is accountable falls near the top of

the range and his criminal activities were performed on innumerable occasions over a lengthy period of time. Not only has he failed to accept responsibility but he wilfully lied under oath in an attempt to escape responsibility and continues to demonstrate no remorse.

Guideline Range Determined by the Court:

Total Offense Level:	30
Criminal History Category:	I
Imprisonment Range:	97 to 121 months
Supervised Release:	3 years
Fine Range	$15,000.00 to $1,000,000.00
Restitution:	N/A

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

* * * * * * * * * * * * * * * * * * * *

UNITED STATES OF AMERICA,

Plaintiff,

v.

HECTOR CARRASCO, JOHNNY ALICEA, and VICTOR ALICEA,

Defendants.

Madison, Wisconsin
October 11, 2000
1:15 p.m.

Case No. 00-CR-0023-S-02
Case No. 00-CR-0023-S-03
Case No. 00-CR-0023-S-05

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TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE JOHN C. SHABAZ

(Filed Dec. 7, 2000)

APPEARANCES:

For the Plaintiff: Office of the United States Attorney
BY: TIMOTHY M. O'SHEA
Assistant United States Attorney
660 West Washington Avenue
Suite 200
Madison, WI 53703

For Defendant Hector Carrasco: Ruth Law Office
BY: ROBERT RUTH
P.O. Box 207
Madison, WI 53701-0207

For Defendant Johnny Alicea: Smerlinski Law Office
BY: JOHN SMERLINSKI
6441 Enterprise Lane
Madison, WI 53719

For Defendant Victor Alicea: Edward John Hunt Law Office
BY: KATHLEEN M. QUINN
316 N. Milwaukee Street, Suite 317
Milwaukee, WI 53202

Proceedings recorded by electronic sound recording, transcript produced by certified transcription service.

* * *

[46] to the gun and the evidentiary hearing, 3C1.1, the defendant lied in an effort to suppress evidence. The evidence was in fact this gun here that we've been talking about. The mere fact that he did poor job of lying is irrelevant. At page 41 is another instance where he denies giving the officers consent to search bedrooms, et cetera.

Concerning the firearms. A firearm such as this, if one is a drug dealer, only works if the word is out on the street that one has a gun. It only deters people much like, you know, we had a theory of national defense once where we strictly relied on nuclear deterrence and the theory was we only – people would not attack the United States because they knew we had atomic bombs. And in much the same way this firearm only works, this firearm only will not be used if the people out on the street know it's out there. There's no better way to do it than to tell your biggest customer.

And I do believe that the Court believes Mr. Young was truthful in his testimony today, that we can attribute an additional 283.5 grams of cocaine to the defendant Victor Alicea. Thank you.

THE COURT: The Court will first issue its determination as it relates to the additional two levels to be provided for obstruction of justice.

The facts: A motion to suppress evidence was held before the Honorable Magistrate Judge Stephen Crocker to suppress [47] evidence seized as a result of the March 16th, 2000 arrest, search and seizure of evidence in Baraboo, Wisconsin. The affidavit of Victor M. Alicea in support of his motion to suppress stated at page – paragraph 9, They did not ask me for my consent to conduct their searches. At no time did any officer ask me if the officers could search my residence. I never gave the officers my consent for them to search the residence. That's in the affidavit. That's the document that the court examined at the time that it addressed the Report and Recommendation which was provided to it by the Magistrate Judge.

The Court stated at page 3 of its Memorandum, The issue is whether defendant Alicea voluntarily consented to the search. The Court determined that issue based on all the circumstances, stressful as they may have been, the defendant's consent to search was voluntary. That's what the record discloses. The Court also examined the transcript at the time that it addressed this matter as it did – Strike that.

That hearing was held on May 19th of 2000 and there were certain portions therein that I noted when examining it as to the lawyer-talk that I always bring the attention to most lawyers and witnesses and the jury when they're looking at "huh" and "duh" and I just thought that that page 48 had it all. Okay. Question: So you – So did you ever refuse to – [48] consent to Special Agent Byal? That was redirect. I never – No. Which no. I never refused

consent to Special Agent Byal. Oh. Because there was never a question as far as searching, you know, there was no – I did not no – deny no consent because they never asked.

The Court as did the Magistrate found that there was indeed the consent to the search. The Magistrate considered many factors in this matter in his memorandum and in his examination of the record and did of course address that item as well, believing as did the Court that there was no objection to the search and the report sets forth the Magistrate's finding, I believe at page 10. There is no reason to find the statements voluntary, he states, if the consent to search was involuntarily [sic] since they are essentially two sides of the same coin. He also said that and he did then recommend that the Court suppress the post-area arrest statements.

As you know, the Court did not accept that recommendation. It found that at the evidentiary hearing Mr. Alicea denied that he ever gave consent for a search and the Magistrate didn't believe him, the Court didn't believe him, nor did the Court find the circumstances egregious and stressful as did the Magistrate to suppress the evidence.

This Court found the determination very material as to its decision because it stated this is the issue. This is the [49] issue this Court is concerned with. Was it voluntary? Once it determined it was voluntary, it then had to do a balancing to determine whether or not the voluntariness was then set aside because of the circumstances of the search. The Court found that it should not be set aside, that it was indeed voluntary and it was material to the Court to make that determination.

The Court believes that the statements made in an affidavit, made in the testimony were very material. That the defendant did under all the circumstances provide for that search. He did determine that the search could be taken and the Court does find that there was here the facts to which it has now referred.

It then has to look to the concern of the parties when determining what points, if any, to add. But having placed those facts on the record, the Court at this time addresses the entire discussion relating to those guidelines which are applicable.

The Court adopts the amended guideline calculations proposed by the Probation Office using the 1998 guidelines manual as further amended by the Court as a result of this hearing. First of all, the Court finds that *Apprendi against New Jersey* is not applicable to the guideline determinations in this case because the drug quantities, firearm possession and other sentencing factors do not result in a guideline

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APPENDIX D

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

* * * * * * * * * * * * * * * * * * * *

UNITED STATES OF AMERICA,

Plaintiff,

v.

HECTOR CARRASCO, JOHNNY ALICEA, and VICTOR ALICEA,

Defendants.

Madison, Wisconsin
October 11, 2000
1:15 p.m.

Case No. 00-CR-0023-S-02
Case No. 00-CR-0023-S-03
Case No. 00-CR-0023-S-05

* * * * * * * * * * * * * * * * * * * *

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE JOHN C. SHABAZ

(Filed Dec. 7, 2000)

APPEARANCES:

For the Plaintiff: Office of the United States Attorney
BY: TIMOTHY M. O'SHEA
Assistant United States Attorney
660 West Washington Avenue
Suite 200
Madison, WI 53703

For Defendant Hector Carrasco: Ruth Law Office
BY: ROBERT RUTH
P.O. Box 207
Madison, WI 53701-0207

For Defendant Johnny Alicea:	Smerlinski Law Office BY: JOHN SMERLINSKI 6441 Enterprise Lane Madison, WI 53719
For Defendant Victor Alicea:	Edward John Hunt Law Office BY: KATHLEEN M. QUINN 316 N. Milwaukee Street, Suite 317 Milwaukee, WI 53202

Proceedings recorded by electronic sound recording, transcript produced by certified transcription service.

* * *

[52] was possessed during the course of the conspiracy. The conspiracy existed at least from 1996 forward. It did not exist at the time the weapon was found so it doesn't make any difference where it was found. That fact is this was after the date of the conspiracy. It was possessed during the course of the conspiracy and it is not clearly improbable the weapon was connected with the offense.

As the Court has said each day that it makes these decisions, this is a tool of the trade for a drug conspiracy. The courts have so determined that it's in possession, it's in the period of the conspiracy, and the only issue is whether or not it was clearly improbable that the weapon was connected with the offense. It is not clearly improbable that the weapon was connected with the offense.

Now we look to the two-level increase in Section 3C1. The Court believes that this must be applied because the defendant's testimony at the hearing and in his affidavit was false. He did provide his consent, it was voluntary, and the Court believes that it was willfully false and

certainly material to the issues at hand. If indeed this Court had determined that there was no consent, I'm sure you must understand that a decision might very well have been different than that which the Court provided to you. The Court did the balancing which it believed to be appropriate and came down on the side that there was that consent and accordingly the [53] fruits were available for this Court to consider and decided in that regard. It was certainly material to this Court. I don't know if we need discuss whether or not it was material to the Magistrate's recommendation or not, but this Court found it to be very material to the issue at hand.

The Court must further find the defendant is not eligible for any downward adjustment for acceptance of responsibility because he took his case to trial and has made, of course, no admissions of guilt nor has he accepted any responsibility.

The Court then does look at the level which remains the same. It remains at 26. There is the two-level addition for the firearm. There is the two-level addition for the 3C1.1 and we reach 30. There is a criminal history category of I. And an offense level of 30 and a criminal history category of I, we do reach 97 to 121 months.

The Court before sentencing then calls upon counsel for those reasons they may have as to where the sentencing should be entered or imposed within that guideline and may also further address the arguments which are not cumulative of those already made as to why the guideline should not be that as the Court has determined from the evidence which is presently before it. Ms. Quinn, you may proceed at this time.

MS. QUINN: Your Honor, I would ask that the Court consider the very lowest number within that guideline range, the 97 months. And the reason that I request that the Court

* * *

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

VICTOR ALICEA,

Defendants.

REPORT AND RECOMMENDATION

00-CR-23-S-05

REPORT

Defendant Victor Alicea has moved to suppress evidence generated during his arrest in his home on March 16, 2000. (Dkt. 118). Alicea seeks to suppress documents, a gun, and statements he made to officers. Alicea contends that he was never provided with his warnings under *Miranda* and that his consent to a search was involuntary. As discussed below, although I find that the agents provided Alicea with *Miranda* warnings, I find that Alicea's consent to search and his post-arrest statements are involuntary. Accordingly, I am recommending that this court grant Alicea's motion to suppress.

On May 19, 2000, this court held an evidentiary hearing on Alicea's motion. Having heard and seen the witnesses and having judged their credibility, and having considered the parties' exhibits and documents. I find the following facts:

Facts

Following a lengthy investigation of the alleged cocaine trafficking organization that is the subject of this prosecution, the government obtained arrest warrants for eight defendants in this case. On March 16, 2000, a task force consisting of agents from the Wisconsin Division of Narcotics Enforcement, the Sauk County Sheriff's Department, and the Baraboo Police Department undertook to execute these warrants. All of the agents met for a preliminary briefing at approximately 5:00 a.m. at the sheriff's office. As part of the briefing, the agents were advised that some of the defendants were known to have possessed firearms. Teams of agents then hastened to the defendants' residences to arrest them.

A team of eight agents went to defendant Victor Alicea's home at 837 Island Court, Baraboo, Wisconsin. Agent Paul Byal was the team leader. As is now *de rigueur* for SWAT team members, the agents were swathed in black from head to toe, goggled, and accoutered with armored vests, web belts, batons, pepper spray, pry bars, rams, and tactical weapons such as shotguns and assault rifles.

Agents had confirmed that this was Alicea's primary residence, along with his fiancée, Andrea Dumke and their two small children. At that time, Alicea was 26 years old, had earned his GED, and had had no previous significant contact with law enforcement authorities.

The agents initiated their arrest of Alicea under cover of darkness at approximately 5:30 a.m. Two agents detached to watch the perimeter. The other six lined up as an entry team. Agent Balchunas approached the door and knocked loudly for approximately five seconds. Everyone

listened five seconds more for sounds of movement within the house; none were heard. Agent Balchunas knocked again for another five seconds. Again everyone listened for sounds of movement but heard nothing. Agent Balchunas checked the door and confirmed that it was locked. Agent Byal ordered the agent carrying the battering ram to fell the door. Approximately 20 seconds had elapsed between the first knock and the door's breach. The agents streamed in to the split level apartment with two agents heading upstairs and four agents heading down, weapons drawn and ready. The lead agent of each squad repeatedly shouted "Police!" loudly and authoritatively.

Prior to the police entry, Victor Alicea and Andrea Dumke slumbered in their downstairs bedroom. Alicea slept in boxer shorts, Dumke in an oversized tee-shirt and nothing else. Alicia [sic] woke with a start when the front door was popped; he may have heard his daughter crying. He raced to the hallway and there he literally ran into the agents, who were shouting and pointing their assault weapons at Alicea. The agents loudly ordered Alicea to the floor and Alicea promptly complied. Agents cuffed his hands behind his back.

At least two agents, including female agent Lisa Wilson, went into the bedroom to handcuff Dumke. Dumke initially resisted, insisting on donning more clothes. The agents persisted and ultimately cuffed Dumke's hands behind her back. Agent Wilson then assisted Dumke in putting on sweat pants. Alicea could hear the agents shouting at Dumke but could not see anything because other agents still had him face down in the hallway with a knee planted in his back.

Agents Byal and Tijerino escorted Alicea to an upstairs living room. While moving Alicea, Agent Tijerino would have put one hand under Alicea's arm and one hand on the cuffs. This maneuver coupled with the tightness of the cuffs caused Alicea discomfort. The agents set Alicea on a chair or couch in the large room, maintaining some distance from him. Agent Byal was armed with an assault shotgun on a sling but he never pointed it at Alicea.

Agent Byal advised Alicea that they had arrested him on federal drug charges. Alicea responded that there must be some misunderstanding because he had already been asked about this stuff and had told the police that he was not involved with the suspected drug trafficking group. Agent Byal, whose only involvement with this case was to effect Alicea's arrest, replied that Alicea would have to work all this out in the courts.

Byal read Alicea his constitutional rights under *Miranda* off of a pre-printed card. Agent Byal then asked Alicea if there were any guns, drugs or large sums of money in the apartment. Alicea responded that there were no drugs or money, but there was a weapon. Agent Byal repeated his question and Alicea repeated his answer.

Although the sequence of events is not entirely clear, at some point during this interrogation agents downstairs shouted that they had found a safe in the bedroom. This would have been after Alicea received his *Miranda* rights but before he was asked to consent to a search. Agent Byal asked Alicea to provide the safe's combination, and Alicea did so. Alicea apparently repeated his assertion that he had no involvement in this matter, which provided Agent Byal a segue into his request for permission to search the apartment. Agent Byal stated that one way to show that

nothing was going on at the apartment was to allow the agents to search it. Neither Agent Byal nor any other agent ever advised Alicea of his right to decline to consent to a search. No one ever presented Alicea with any written consent-to-search form to read or sign.

Alicea orally consented to the search of the apartment and his automobiles out in the garage. After obtaining the combination and the keys to the car, Agent Byal went downstairs to search the car and to allow others to search the safe. He had a brief conversation with Dumke about what was happening and why. In the subsequent search agents found the gun in the safe and a paper on which police radio frequencies were noted.

Analysis

Police-citizen confrontations like that outlined above are now played out with depressing regularity in almost every community in this judicial district, this state, and across the country. The nature and amount of force now deemed necessary by law enforcement agents to enter safely the residence of a charged drug trafficker would have been unthinkable a decade ago; somewhere along the line, however, drug dealers got more violent and started carrying bigger guns. The natural response by the police has been to protect themselves by measures such as those undertaken in this case. The police can hardly be faulted for endeavoring to minimize the risk that they will be killed or wounded entering a strange house occupied by a charged drug trafficker who might have access to a gun. Even so, people disagree whether such tactics are necessary. See, for example, the point-counterpoint opinion and dissent regarding a forceful home entry in *United States v.*

Jones, ___ F.3d ___, 2000 WL 681008 (7th Cir. May 26, 2000).[1]

All of this bears on the actual question to be answered in this case: whether the agents' search of Victor Alicea's home was supported by an exception to the warrant requirement. I find that it was not: although Alicea consented to the search, his consent was involuntary. *See United States v. Strache*, 202 F.3d 980, 984 (7th Cir. 2000). I find that under the totality of the circumstances, Alicea's consent was the product of both express and implied duress and coercion. While I understand why the police entered the apartment as they did, and why they treated Alicea and Dumke as they did, a byproduct of such preemptive tactics is the creation of anxiety, stress and duress. A pre-dawn raid of this nature increases the government's burden of establishing the voluntariness of defendant's consent to search.

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[1] In the instant case, a different squad of agents violated codefendant Melvin Alicea's Fourth Amendment rights when it arrested him at his front door, whisked him away to a waiting van, then climbed the stairs to enter and search Alicea's second-floor apartment without a warrant as part of a purported search "incident" to the arrest. The government has conceded the patent illegality of that entry. While the Assistant U.S. Attorney has done the right thing, this is still a disturbing occurrence because it demonstrates that none of the agents or their supervisors knew the constitutional limits on their authority to enter a home to execute an arrest warrant. Melvin Alicea has decided to plead guilty, which means he's got no traction for a *Bivens* lawsuit; therefore, there will be no consequences to the law enforcement authorities that might encourage them to bone up on their constitutional law. Even so, I am *not* recommending suppression in Victor Alicea's case as a backhanded way to punish the police for what they did to Melvin Alicea. The agents' actions toward Victor Alicea stand on their own.

In determining the voluntariness of any consent to search, a reviewing court must carefully scrutinize all of the surrounding circumstances, including the defendant's age and intelligence; whether agents advised him of his constitutional rights; the length of detention prior to consent; whether the consent was immediate or the result of repeated police requests for consent; whether physical coercion was used; and whether the defendant was in custody. *United States v. Strache*, 202 F.3d at 985.

Here, factors cut in both directions. Alicea was in his twenties and of average intelligence, although he is not particularly articulate. He was certainly *capable* of giving voluntary consent under the right circumstances. Here, however, the circumstances were not conducive to a rational exercise of free will.

Starting at the beginning, although the police waited approximately 20 seconds after they first knocked before they rammed the door, it would have been impossible for a sleeping man to respond in time to prevent a forceful entry to his home. Why do police attempt these entries before dawn? Because they *want* to catch the sleeping defendant off guard to minimize the danger to them, the defendant and his family. So it was in this case, where the agents saw no signs that anyone was awake before they knocked.

So, Alicea was torn from his sleep by the boom of his front door giving way. Before he could even reach the stairway the agents had descended upon him obscured by the intentional darkness of their garb but shouting at the top of their lungs and pointing large tactical weapons at him.

While Alicea was face down on the floor, he heard his tee-shirt clad fiancee struggling with the officers who

wanted to cuff her before they would allow her to slip on a pair of pants. Alicea was then escorted up the stairs, in mild pain, and planted in his living room with two agents. Why didn't they just whisk him to the waiting car, as was done with Melvin Alicea? Because, testified Agent Byal, he wasn't dressed for it. Why not dress him? Because the agents obviously wanted to develop some evidence first. So they ensconced the half-naked Alicea in an upstairs room and started working on obtaining his cooperation.

It was clear to the agents that Alicea was confused and upset because he told Agent Byal that there had been a mistake: Alicea had already explained his non-involvement in this matter to some other agent. Agent Byal honestly told Alicea that that wasn't Byal's concern. Whatever the intended effect of this response, it could only have whittled down Alicea's will to assert himself, since the message received was that the police obviously were going to do what they wanted and would disregard Alicea's input. This impression could only have been amplified by Agent Byal disregarding Alicea's negative response to the question whether there were drugs present and repeating the question in the expectation of receiving a different answer.

Agent Byal then *Mirandized* Alicea, but did not advise him of his right to refuse to consent to a search. This was an odd choice of advisals because Agent Byal, as a tactical agent uninvolved in the underlying investigation, wasn't in a position to question Alicea, but he *was* in a position to seek consent for a warrantless search. Prior to Agent Byal actually popping the question and seeking such consent, some other agent called up the stairs to announce that they had found a safe. Did they find it as part of a protective sweep, or had they started a more general rummaging

through Alicea and Dumke's effects once the handcuffs were on? Such a distinction might matter to a judge after the fact (although the answer to the question is not in the record), but on the scene, at the time, the bewildered Alicea was not aware of such legal niceties. The loud message broadcast to Alicea by the presence of six para-military agents wandering through his house and poking through his stuff while he and his fiancee sat restrained and half-clothed was more Borg-like: resistence is futile.

Agent Byal made the consent issue even more of a Hobson's choice by framing it as a test of Alicea's professed innocence: one way to convince the police that there was nothing bad in the apartment was to let them confirm this for themselves with a search. In other words, failure to consent will be construed as evidence of guilt. Alicea consented.

At the evidentiary hearing Alicea denied that he ever gave consent for a search, but I didn't – and don't – believe him. This, however, does not shift the government's burden of persuasion to Alicea. Using the testimony of the government's own witness leads me to conclude that Alicea's will was overborne by direct and indirect pressure applied by the agents.

I do not find that Agent Byal or any other agent *intended* to overbear Alicea's will. And I repeat ~~that~~ I am not in a position to criticize the method in which the tactical team entered Alicea's home that morning. But one of the consequences flowing from a pre-dawn, high-force home entry is that the government starts in a hole when it later tries to convince a court that the defendant was in the proper frame of mind to consent voluntarily to a search. Here, the agents exacerbated the problem by failing to advise Alicea of his right to refuse to consent,

and by implying that he was a liar who could only prove his *bona fides* by acceding to the agents' requests. In sum, the government has not met its burden of persuasion in response to Alicea's motion to suppress.

Alicea has also moved to suppress statements that he made to the agents. Alicea claimed that he did not receive full *Miranda* warnings, but I have found to the contrary. Agent Byal asked Alicea what was in the safe and asked him to provide the combination. Because Alicea knew he didn't have to answer any questions, this is a closer call than the search issue, but it fits under the same analysis: the answer was teased out of Alicea by a combination of forceful tactics and subtle cajoling. Alicea probably didn't even consider such inquiries questions to which *Miranda* applied. There is no reason to find these statements voluntary if the consent to search was involuntary, since they are essentially two sides of the same coin. Accordingly, I am recommending that this court suppress Alicea's post-arrest statements as well.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court grant defendant Victor Alicea's motion to suppress statements and physical evidence.

Entered this 11th day of July, 2000.

BY THE COURT:

/s/ Stephen L. Crocker
STEPHEN L. CROCKER
Magistrate Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, Plaintiff, v. VICTOR ALICEA, Defendant.	MEMORANDUM and ORDER 00-CR-023-S-05

Defendant Victor Alicia [sic] is charged with conspiracy to distribute cocaine and distributing cocaine or aiding and abetting in its distribution. Defendant moves to suppress documents, a gun and statements he made to officers.

On May 19, 2000 the Honorable Steven L. Crocker, United States Magistrate Judge for the Western District of Wisconsin, held an evidentiary hearing on defendant's motion to suppress. The Magistrate Judge issued a report and recommendation recommending that defendant's motion to suppress statements and evidence be granted.

No objections have been filed. Pursuant to 28 U.S.C. §636(b)(1)(C) this Court reviews the report and recommendation and finds as follows.

FACTS

At about 5:30 a.m. on March 16, 2000 eight law enforcement agents went to Victor Alicea's home at 837 Island Court, Baraboo, Wisconsin to arrest him. The agents

were dressed in black, goggled and armed with batons, pepper spray, pry bars, rams, shotguns and assault rifles. An agent knocked loudly on the door for approximately five seconds. There was no response. He repeated his knock. The door was locked. The agents then broke down the door and entered the house with drawn weapons shouting "Police".

The agents loudly ordered Alicia [sic] to the floor and handcuffed him behind his back. Agents then escorted defendant to an upstairs living room where he sat in a chair. His fiancee and their two small children were in another part of the house.

Defendant was advised that he was being arrested on federal drug charges. An agent read him his Constitutional rights under *Miranda*. Another agent advised him that there was a safe in the bedroom. Defendant Alicia [sic] was asked to provide the combination of the safe which he did. He was also asked what was in the safe and he responded that a gun was in the safe. Alicia [sic] then orally consented to a search of the apartment and his automobiles in the garage. During the search the agents found a gun in the safe and a paper on which police radio frequencies were noted.

MEMORANDUM

Defendant moves to suppress documents, a gun and statements made to officers. Defendant was arrested pursuant to an arrest warrant on March 16, 2000.

The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest. *Maryland v. Buie*, 494 U.S. 325 (1990). A more extensive

search of the premises requires either a search warrant or consent of the person arrested.

The issue is whether defendant Alicea voluntarily consented to the search. In determining the voluntariness of a consent to search a Court must consider all surrounding circumstances including the defendant's age and intelligence, whether the law enforcement officers advised him of his constitutional rights, the length of detention prior to consent, whether the consent was immediate or the results of repeated police requests for consent, whether physical coercion was used and whether the defendant was in custody. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *United States v. Strache*, 202 F.3d 980, 984 (7th Cir. 2000).

Defendant was in his twenties and of average intelligence. The officers advised his [sic] of his rights under *Miranda* from a prepared card. The officer then asked him to consent to a search and to provide the combination to the safe which he did. He was not detained for a long time prior to providing his consent nor subjected to repeated requests for consent.

The Magistrate Judge finds that there was coercion used to procure defendant's consent. The facts he relies on to support this conclusion are the time of the arrest, 5:30 a.m., and the armed forced entry pursuant to the arrest warrant when defendant failed to open the door when the officers knocked.

Defendant Alicea cites three cases concerning similar arrests where the Court found a defendant's consent voluntary. In all three cases, however, the defendant signed a written consent. Alicea did not sign a written consent but gave his consent orally.

In *United States v. Rojas*, 798 F.2d 105 (7th Cir, 1986), *cert. denied*, 479 U.S. 856 (1986), seven armed law enforcement officials executed an arrest warrant at Rojas' home during the evening. Rojas was handcuffed and taken to a small bedroom where an FBI agent and a DEA agent asked Rojas whether he would consent to a search of the house. Rojas signed a consent form. The court upheld his consent as voluntary noting that the handcuffs placed on him were a precautionary measure rather than intimidating or coercive, that defendant was detained a mere two minutes before providing his consent and there was no prolonged or repeated interrogation before the consent.

In *United States v. Kozinski*, 16 F.3d 795 (8th Cir. 1994), defendant Havelka was arrested at his home pursuant to a valid arrest warrant. The armed officers entered Havelka's apartment, handcuffed him, placed him on the couch and requested his consent to the search within a few minutes. Havelka gave his written consent. The Court found his consent voluntary.

In *United States v. LaGrone*, 43 F.3d 332 (7th Cir. 1994), LaGrone was arrested at his grocery store pursuant to a valid arrest warrant. The officers entered the store weapons drawn. LaGrone was handcuffed and informed of his *Miranda* rights. He was briefly interrogated and asked to consent to a search of the store. LaGrone signed a written consent form. The Court upheld his consent as voluntary.

Defendant's case is similar to these three cases except that he did not sign a written consent form. This fact standing alone is not enough to support the conclusion that defendant's consent was not voluntary according to *Schneckloth*.

Based on defendant's age and intelligence he was capable of giving a voluntary consent to the search. Although

distressful this entry was forced by the officers pursuant to an arrest warrant and defendant was handcuffed, there was no physical coercion or force used to obtain the consent of Alicea to the search. He was not detained for lengthy period of time nor subjected to repeated interrogation after he was advised of his rights. Defendant was asked to consent to a search and to provide the combination of the safe which he did. Based on all the circumstances stressful as they may have been the defendant's consent to the search was voluntary.

The statements which defendants seeks to suppress are his statements that a gun was in the safe and the combination of the safe. Defendant's statements were made after he had been advised of his rights under *Miranda* and that such statements could be used against him. The Court finds these statements were voluntarily made after defendant was advised of his rights.

Defendant's motion to suppress documents, the gun and his statements will be denied.

ORDER

IT IS ORDERED that defendant's motion to suppress evidence and statements is DENIED.

Entered this 25th day of July, 2000.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge